

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

HIGHWAY TECHNOLOGIES, INC.

Employer,

and

Case 28-RC-6585

**LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL UNION 872¹**

Petitioner

DECISION AND DIRECTION OF ELECTION

Laborers International Union of North America, Local Union 872 (Petitioner), seeks an election in a unit comprised of all employees employed by the Employer at its Las Vegas, Nevada facility. The Petitioner seeks to include in the unit all traffic control employees, yard employees, warehouse employees, strippers, sign shop employees, permanent installation employees, and mechanics. Contrary to the Petitioner, the Employer urges that any unit found appropriate must include the six employees employed as planners, customer care representatives, the collection clerk, and the accounts receivable clerk. Moreover, the Employer contends that Foreman Ronald Fulton should be excluded from the unit found appropriate because he is a supervisor within the meaning of Section 2(11) of the Act. The units proposed by the Petitioner and the Employer would consist of approximately 34 and 40 employees, respectively.

Based upon the reasons more fully set forth below, I find that the unit sought by the Petitioner is an appropriate unit. Based primarily on factors such as differing supervision, job functions and skills, working time spent away from the Employer's facility, working hours, differing equipment from the employees in the petitioned-for unit, and the lack of job interchange with these employees, I conclude that planners, customer care representatives, the collection clerk, and the accounts receivable clerk do not share a community of interest with those in the petitioned-for unit and should be excluded from the unit. I further conclude that Fulton is a supervisor within the meaning of Section 2(11) of the Act and, thus, should be excluded from the unit on this basis.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

¹ The name of the Petitioner appears as corrected at the hearing.

1. **Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The parties stipulated that the Employer, Highway Technologies, Inc., a Massachusetts corporation, is engaged in providing highway safety services and products at its 4533 Andrews Street, North Las Vegas, Nevada, facility. During the 12-month period preceding the hearing in this matter, the Employer derived gross revenues in excess of \$500,000, and purchased and received at its Las Vegas, Nevada, facility goods and materials valued in excess of \$50,000 directly from sources outside the State of Nevada. The Employer is engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Claim of Representation:** The parties stipulated that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. **Statutory Question:** A question affecting commerce exists concerning the representation of certain employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. **Unit Finding:** This case presents two issues. First, whether any unit found appropriate must include planners, customer care representatives, the collection clerk, and the accounts receivable clerk. Second, whether Fulton is properly included in the unit sought by the Petitioner, or excluded as a supervisor within the meaning of Section 2(11) of the Act. To provide a context for my discussion of these issues, I will present the record facts regarding the Employer's operations and background, its supervisory and organizational structure, and the terms and conditions of employment for the Employer's traffic control employees, yard employees, warehouse employees, stripers, sign shop employees, permanent installation employees, mechanics, planners, customer care representatives, the collection clerk, and the accounts receivable clerk. I will then present the case law and analysis that supports my conclusions on these issues. At the outset, I note that the parties stipulated that there is no collective-bargaining history.

A. The Employer's Operations and Background

The Employer, Highway Technologies, Inc., is a national corporation with 50 to 60 locations throughout the United States. It maintains a facility at Las Vegas, Nevada, where it engages in four interrelated lines of business: permanent installation of traffic signage and fixtures; pavement marking; traffic control; and contractor supplies sales. The permanent installation of traffic signage and fixtures includes the installation of guard rails and signs, of the large sign structures found on interstate highways, of road signs, and of neighborhood street signs. Pavement markings range from the pavement markings such as striping found on interstate and other highways to parking lot pavement markings at casinos and other private commercial enterprises. Pavement markings also include reflective buttons embedded into highways and roads. Traffic control often involves lane closures, including the message boards

and arrow boards which direct traffic circulation under closure conditions. Finally, the Employer sells materials which relate to the preceding three lines of business to customers and other contractors. Among these materials sold are attenuator trucks, message boards, signs, and cones.

Gilbert Joseph, Jr., is the branch manager of the Employer's Las Vegas facility and is responsible for overseeing all aspects of the branch, including human resources, sales, business growth profitability, and productivity. In addition to managing the Employer's Las Vegas branch, Joseph also manages the Employer's branch in St. George, Utah. Joseph has held this position with the Employer since his hire in approximately September 2006.

Reporting directly to Joseph are Operations Manager, Dave Wendell; Warehouse and Purchasing Manager, Dave Johnson; Lead Estimator and Safety Officer, Larry Burcham; Traffic Control Line of Business Manager, Matt Lowery; and the Job Cost Manager/Office Manager, a position that was unencumbered at the time of the hearing. The Operations Manager, Warehouse and Purchasing Manager, Operations Manager, Lead Estimator and Safety Officer, and Traffic Control Line of Business Manager positions are all salaried positions. The record is not clear as to whether the Job Cost Manager/Office Manager position is salaried. There is also a Nighttime Traffic Control Manager position, previously held by Gene Pinnotti, but the record is not clear to whom the holder of this position directly reports or whether this is a salaried position.

The Employer's facility is on a property of about one and a half acres and is comprised of office space; a warehouse which houses the Employer's sign shop; and a yard where trucks and traffic control materials and supplies are maintained and stored.

B. The Stipulated Unit Employees and Their Work Duties

The Employer employs approximately 28 employees in the petitioned-for unit. Among these employees are traffic control employees, permanent installation employees, strippers, warehouse employees, sign shop employees, yard employees, and mechanics. The Petitioner and the Employer stipulated at the hearing that these employees share a sufficient community of interest to constitute an appropriate unit for the purpose of collective bargaining. Based on the following facts, I conclude that the record supports this stipulation:

1. Traffic Control Employees

Traffic Control Employees are engaged in various field operations of the Employer. Traffic Control Employees perform the setup work required when construction or other circumstances mandate roadway or lane closures. They place markers and barriers. They place cones and set up the message boards and arrow boards which direct traffic and inform drivers. Each day drivers are lined out, or given work orders, when they report to the Employer's facility. After picking up these work orders, the Traffic Control Employees perform most, if not all, of the work relating to these work orders away from the Employer's facility. Traffic control Employees drive trucks provided by the Employer. While the Traffic Control Employees are working in the field, they remain in communication with the Employer's facility by way of two-way communications devices. Traffic Control Employees are paid from approximately \$10.00 per hour up to \$37.64 per hour depending whether the job is a prevailing wage rate job or

not. Traffic Control Employees are required to wear green shirts with the Employer's logo. They are also required to wear steel-toed boots, goggles, and hard hats. They work on shifts both during the day and night and on weekends. Traffic Control employees are supervised by the Employer's two Traffic Control Line of Business Managers, the Nighttime Traffic Control Supervisor, and the Lead Traffic Control Driver.

Traffic Control Employees have the opportunity to participate in the Employer's 401(k) plan, which has an Employer match. They have the choice of several different levels of health care packages.

2. Permanent Installation Employees

Permanent Installation Employees primarily install guard rails, large sign structures seen on the interstates, and road and street signs seen in the city and in neighborhoods. Similar to Traffic Control Employees, each day Permanent Installation Employees report to the Employer's facility where they receive their work orders. While working in the field, they remain in communication with the Employer's facility by way of two-way communications devices. They are paid up to \$37.64 per hour depending whether the job is a prevailing wage rate job or not. They are required to wear green shirts with the Employer's logo. They are also required to wear steel-toed boots, goggles, and hard hats. Permanent Installation Employees work on shifts both during the day and night and on weekends. They are supervised by the Purchasing and Striping Manager. Like the Traffic Control Employees, Permanent Installation Employees participate in the Employer's 401(k) and health plans.

3. Stripers

Stripers paint pavement markings on street, highways, and interstates. They also install embedded reflective making in roads. Stripers perform marking services for private businesses, such as casinos. Among these services is the painting of markings in parking facilities. Stripers are given work orders when they report to the Employer's facility; they perform their work away from the Employer's facility; and they drive trucks provided by the Employer. They are paid up to \$37.64 per hour depending on whether the job is a prevailing wage rate job or not. They are required to wear green shirts with the Employer's logo. They are also required to wear steel-toed boots, goggles, and hard hats. They are supervised by the Purchasing and Striping Manager. Stripers participate in the Employer's 401(k) and health plans.

4. Warehouse Employees

The Employer employs one Warehouse Employee who works in the warehouse at the Employer's facilities. The Warehouse Employee's primary responsibility is inventory control. His work duties include counting product going into and out of the facility. He ensures that each item is captured and recorded. This product includes the goods and materials used by the Employer in its traffic control line of business, as well as the goods sold and rented by the Employer. The Employer generally keeps about two months of work materials on hand in the warehouse. The Warehouse employee performs all of his work at the Employer's facility. He is required to wear a green shirt with the Employer's logo and is supervised by the Warehouse and Purchasing Manager. He participates in the Employer's 401(k) and health plans.

5. Sign Shop Employees

The Employer employs three Sign Shop Employees. These employees work in the Employer's sign shop, which is located in the warehouse area at the Employer's facility. The Employer maintains a racking system in the sign shop where materials, including aluminum blanks are stored. These blanks are used in the manufacture of street and road signage by the Sign Shop Employees. Sign Shop Employees interpret customer work orders and, from these orders, design and manufacture the desired signage. These signs are then sold directly to customers or installed by the Employer's Permanent Installation Employees. The Sign Shop Employees perform all of their work at the Employer's facility. The record is silent as to who supervises the Sign Shop Employees, but the record clearly shows that Sign Shop Employees are not supervised by the Office Manager, when that position is encumbered.

6. Yard Employees

The Employer maintains a contracting yard where it employs one yard employee. The Employer's contracting yard is a large square-shaped area at the Employer's facility that is below the traffic control equipment storage area. The contracting yard is where the Employer keeps its trucks that mainly are involved in performing the Employer's general contracting work. In the yard, the Employer maintains a water blaster, paint trucks, and punch trucks. Punch trucks are used in guardrail installations to punch the holes in the ground. The Employer also stores various other equipment and materials in the contracting yard. In this yard, the Employer stores pavement marking equipment, propane tanks, a type of paint called polyurea, and wooden and aluminum guard rails.

The Yard Employee is responsible for keeping the yard organized and keeping a safe work environment. He takes care of the disposal of the Employer's products, such as the cones and the barrels that have been damaged on a jobsite and are no longer suitable for usage. The Yard Employee is responsible for scrapping and disposing of aluminum left over from sign manufacturing in the Employer's sign shop and signs that are no longer suitable for use. He helps load product onto the drivers' trucks. On occasion, he also helps the Warehouse Employee in receiving. This occurs when trucking companies arrive to deliver products. The Yard Employees then uses his forklift to unload the products and put the product into the warehouse.

The Yard Employees does all of this work at the Employer's facility. He wears the Employer's green logo shirt. He is supervised by the Warehouse and Purchasing Manager, and he participates in the Employer's 401(k) and health plans.

7. Mechanics

The Employer employs one Mechanic. The Mechanic works in a shop at the Employer's facility. He does simple repair on the Employer's message boards and arrow boards. He also performs very simple mechanical work on the Employer's trucks. The Mechanic does not perform major repairs on equipment at the facility. The Mechanic has an equipment bay next to the Mechanic Shop. There is also a wash bay and a traffic control equipment repair area adjacent to the Mechanic Shop. The record is silent as to who supervises the Mechanic, but the record clearly shows that the Mechanic is not supervised by the Office Manager, when that position is encumbered. The Mechanic participates in the Employer's 401(k) and health plans.

C. The Employees in Dispute and Their Work Duties

1. Planners

The Employer employs two Planners. The Planners draw up the plans for traffic control work. Although the Planners, using the Employer's computers, draw up these plans in office space located at the Employer's facility, Planners do have to spend time in the field discussing and coordinating with the Employer's Traffic Control Employees in order to create these plans. Planners also communicate with Traffic Control Employees when Traffic Control Employees have technical questions. This communication occurs both when the Planners are in the field and when field employees come into the office. Planners and field employees also communicate daily by two-way communication devices. The Planners are not former Traffic Control Employees, nor are any of the Traffic Control Employees former Planners.

Planners are not required to wear green shirts with the Employer's logo. Nor are they required to wear steel-toed boots, goggles, and hard hats. Planners work during daytime office hours and do not generally work nights or on weekends. Planners are supervised by the Office Manager, or in the absence of an Office Manager, by the Branch Manager. Planners participate in the Employer's 401(k) and health plans.

2. Customer Care Representatives

The Employer employs two Customer Care Representatives. Customer Care Representatives take calls from customers and perform various clerical functions, including inputting customer requests into the computer and generating the work orders that supervisors assign to the field employees. In the course of their work, they talk on daily basis with field employees, transferring information from the customer, including work requests or requests for daily rentals to the field employees. Field employees call Customer Care Representatives throughout the day to get clarifications on work orders. These clarifications appear to concern exactly what the customer wants done, because the record reflects that the Customer Care

Representatives calls the customer for these clarifications and then passes the information onto the field employees. Customer Care Employees operate computers to perform their job duties. They rarely have the occasion to go into the field, and when they do, it is for training rather than performing work. Customer Care Representatives are not required to wear green shirts with the Employer's logo. They also are not required to wear steel-toed boots, goggles, or hard hats. They work during daytime office hours and do not generally work nights or on weekends. Customer Care Representatives are supervised by the Office Manager, or in the absence of an Office Manager, by the Branch Manager. They participate in the Employer's 401(k) and health plans.

3. Accounts Receivable/Collection Clerk and Liens and Contracts Clerk

The Employer employs Darlene Adams as an Accounts Receivable/Collection Clerk. The Accounts Receivable/Collection Clerk's primary job is to call customers to ensure payment of invoices for work that the Employer has performed. Secondly, she is responsible for entering completed work orders into the computer.

The Employer employs Miles Sorenson as the Liens and Contracts Clerk. Sorenson deals mainly with some of the Employer's larger customers and larger contracts. Her job sometimes is very technical in nature, since she must determine the correct billing by determining what percent of the job has been completed and what corresponding percentage of the total bill should be billed at the time. She works with customers to ensure that the customer agrees that the proposed percentage of the job to be billed is complete before the bill is sent to the customer. She also calls customers to pursue timely payments.

Both the Accounts Receivable/Collection Clerk and the Liens and Contracts Clerk perform all of their duties in the Employer's office. They are not required to wear green shirts with the Employer's logo, nor are they required to wear steel-toed boots, goggles, or hard hats. They work during daytime office hours and do not generally work nights or on weekends. They are supervised by the Office Manager, or in the absence of an Office Manager, by the Branch Manager. They participate in the Employer's 401(k) and health plans.

D. Supervisory Status of Traffic Control Lead Ronald Fulton

The Employer, contrary to the Petitioner, contends that Traffic Control Lead Ronald Fulton is a supervisor within the meaning of Section 2(11) of the Act. At the hearing, the Employer adduced evidence which shows that Fulton was hired by the Employer on April 24, 2005, as a Laborer I. Fulton's rate of pay at the time of his hire was \$10.00 per hour, or \$20,800 annually. On November 7, 2005, Fulton received a salary adjustment to \$11.00 per hour, or \$22,880 annually. On April 20, 2006, Fulton received a promotion to Traffic Control Lead and a "promotional increase" in pay to \$12.935 per hour, or \$26,904.80 annually. In April 2007, Fulton received a pay increase to \$13.711 per hour, or \$28,518.88 annually. After becoming the Traffic Control Lead, Fulton began to be scheduled each fourth weekend as the On-Call Supervisor. This assignment required him to work from 4:00 p.m. on Friday through 4:00 p.m. on Sunday on scheduled weekends. The Employer pays him a flat payment of \$30.00

per day for being on call. Although the base annual wages for Fulton totaled less than \$30,000, during 2007, Fulton received actual wages of \$70,000 to \$80,000. This difference between Fulton's base wages and actual wages can be explained by factors including Fulton's being assigned additional duties in overseeing a yearlong project, and the fact the Fulton often received preference in performing \$37.64 per hour prevailing wage rate work. Fulton is either assigned this prevailing wage rate work by others or is able to assign such work to himself.

Fulton generally works Sunday through Thursday. Monday through Thursday, Fulton works from 1:00 p.m. "until the work throughout the day is completed." The record shows that the end of the day can be anytime from 10:00 p.m. to 2:00 a.m. Fulton's work on Sunday is from 4:00 p.m. "until the work is completed." Fulton fills in for Lead Estimator and Safety Officer Burcham every Thursday when Burcham goes to the Employer's facility in St. George. Additionally, Fulton fills in for Burcham when he is on vacation or off work for medical or other personal reasons. Although Fulton's hours overlap somewhat with those of Traffic Control Line of Business Manager Lowery and Burcham, after 2:00 p.m. Sunday through Thursday, there is no supervisor other than Fulton on duty.

Fulton has had the authority to assign work to shift and weekend Traffic Control Employees since the time he was promoted to Traffic and Control Lead. When he arrives at work, Fulton goes to Lowery's office, where the prepared work orders for the shift are kept. Fulton reviews these work orders and determines which work will be assigned to each individual Traffic Control Employee on that shift. In making this assignment, he takes into consideration the employee's experience, how expeditiously the employee is able to carry out their assignments, and the workload available for the shift. Either on his own or at the request of Traffic Control Employees, Fulton has the authority to adjust the work scheduled. As Fulton testified, "I would assign the work based on how I felt it should be done." He further testified that he knew that some of the employees "don't know some of the more complicated stuff."

Fulton also decides which employees will receive the more lucrative prevailing wage rate jobs. The pay differential between these prevailing wage rate jobs and normal assignments can be as much as \$27.64 per hour. Fulton has the authority to assign these jobs to himself or to any other employee on the shift. There appear to be no specific guidelines provided by the Employer on how these prevailing wage jobs should be assigned. Thus, Fulton's discretion in assigning these jobs seems unchecked. Indeed, when a driver complained to the Employer that Fulton was unfairly "cherry picking" the best jobs, the Employer took no corrective action against Fulton.

After making work assignments, Fulton answers any questions the employees may have with respect to their assignments. While the employees are in the field, Fulton possesses and at times exercises the authority to resolve any issues or questions that may arise. Although employees may resolve simple problems themselves, more serious issues are resolved by Burcham, Lowery, or Fulton. Some of the issues that come up are as simple as whether cones should be placed in a more extended contiguous work area. If a more complicated issue arises such as if the work area is not contiguous and is, for example, on the opposite side of the street or around the corner, Fulton or another supervisor must be contacted for instructions on how to proceed. Also, if new work arrives during the day, or the assigned order takes longer than anticipated, Fulton has the authority to order employees to perform the new order or complete

the protracted assigned project, even if it is necessary to extend the employee's work day to do so. Failure to follow Fulton's orders could result in discipline being given to the employee.

From sometime in 2006 until October 2007, Fulton was a supervisor on NDOT 3300, a large project that the Employer was performing for the Nevada Department of Transportation. He was responsible the entire traffic control portion of the job and performed this function every day of the job. He directed Traffic Control Employees in what assignments they had to perform. He was also the contact person with the State of Nevada's project manager. He was in charge of overseeing the overall scope of the job and in making any adjustments, depending on the needs of the customer. He had the authority to and did, in fact, make these adjustments without consultation with higher supervision or management. In some respect, undisclosed by the record, Fulton failed to perform this assignment as expected and was reprimanded for his performance in overseeing the job.

Although Fulton claimed at the hearing that he has resigned as Traffic Control Lead, the record does not support this contention. In this respect, the record shows that although Fulton wrote a letter to the Employer noting his dissatisfaction in not being promoted to the Nighttime Supervisor position and requesting to be relieved of supervisory duties, the Employer never acceded to his request. Thus, Fulton still receives the same wage rate, he is still a part of the weekend supervisory rotation, and he still assigns work orders to Traffic Control Employees.

Finally, although the record largely deals with Fulton's job duties, the record provides a sufficient basis for concluding that on a regular basis, Lead Gary Burns performs the same duties as Fulton.

D. Legal Analysis and Determination

1. Traffic Control Leads Are Statutory Supervisors

Section 2(11) of the Act defines the term "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

The possession of any one of these authorities is sufficient to deem the employee vested with such authority as a supervisor. *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *Westwood Health Care Center*, 330 NLRB 935 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998); *Allen Services Co.*, 314 NLRB 1060 (1994). Persons with the power "effectively to recommend" the actions described in Section 2(11) are supervisors within the statutory definition. *Sun Refining & Marketing Co.*, 301 NLRB 642, 649-650 (1991); *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972).

Although not dispositive of the issue of supervisory status, non-statutory indicia can be used as background evidence on the question of supervisory status. See *Training School of Vineland*, 332 NLRB 1412 (2000); *Chrome Deposit Corps.*, 323 NLRB 961, 963 fn. 9 (1997). As the Board has explained, non-statutory indications of supervisory status, or “secondary indicia,” such as higher pay, supervisor to non-supervisor ratios, or inclusion in supervisor meetings, may bolster evidence demonstrating that employees otherwise exercise one of the powers listed in the statute. See *Marian Manor for the Aged and Infirm*, 333 NLRB 1084 (2001); cf. *Ken-Crest Services.*, 335 NLRB 777 (2001).

The burden of proving supervisory status is on the party that alleges that it exists. *St. Francis Medical Center West*, 323 NLRB 1046 (1997). Thus, the burden of establishing the Leads’ supervisory status lies with the Employer.

Individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., “assign” or “responsibly to direct”) listed in Section 2(11); (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) their authority is held “in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. “[T]he burden of proving supervisory status rests on the party asserting that such status exists.” *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); accord *Kentucky River*, 532 U.S. at 711-712 (deferring to existing Board precedent allocating burden of proof to party asserting that supervisory status exists). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Dean & Deluca*, 338 NLRB at 1047; *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

The authority to “assign” refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.... In sum, to ‘assign’ for purposes of Section 2(11) refers to the ... designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task.” *Oakwood Healthcare*, 348 NLRB No. 37, slip op. at 4 (2006).

The authority “responsibly to direct” is “not limited to department heads,” but instead arises “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ ... provided that the direction is both ‘responsible’ ... and carried out with independent judgment.” *Id.* slip op. at 6. “[F]or direction to be ‘responsible,’ the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly.” *Id.* slip op. at 7. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”

“[T]o exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” Id. at 8. “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. slip op. at 8. “On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” Id. slip op. at 8 (citations omitted). Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that “[t]he authority to effect an assignment ... must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” Id. slip op. at 8 (citations omitted).

The record establishes that Traffic Control Leads assign and responsibly direct the work of Traffic Control Employees. The record reveals that Leads exercise substantial discretion in determining which work orders will be assigned to individual employees. Leads gather work orders each day, read the orders, and determine the complexity and duration of the work that needs to be done. The Leads group the orders in such a fashion as to provide the employee to be assigned the orders with scheduled work that the employee can accomplish within the employee’s set of skills and within the employee’s work day. On a daily basis, the Leads determine how much an employee is going to be paid through the assignment process. Thus, a Lead may assign an employee work at the employee’s base wage rate or at the prevailing wage rate, which is as much as \$27.64 per hour higher than the employee’s base rate. These assignments vary each day and appear to be totally within the discretion of the Lead. Based on these facts, I find that Traffic Control Leads exercise independent judgment in the assignment of work to Traffic Control Employees.

The record further establishes that Traffic Control Leads responsibly direct the work of Traffic Control Employees. Once work is assigned to a Traffic Control Employee, that employee is in contact with the Lead by two-way communication. Substantial modifications in the work assignment must be cleared through a Traffic Control Lead or a manager. Leads make additional assignments of work during the day, which may require an employee to work overtime. If such a work assignment is made, an employee must accept the assignment or be subject to discipline. In certain circumstances, Leads are assigned the responsibility of overseeing an entire project. When Fulton received such an assignment in NDOT 3300, he failed to perform this assignment as expected and was reprimanded for shortcomings on the job. Based on these facts, I find that Traffic Control Leads are invested with the authority to direct the work of others, to take corrective action, if necessary, and that there are adverse consequences for the Leads if the Leads do not take the appropriate action.

Based on the foregoing, I conclude that Traffic Control Leads are supervisors within the meaning of Section 2(11). Accordingly, I shall exclude them from the unit found appropriate herein.

2. An Appropriate Unit Need Not Include the Planners, Customer Care Representatives, the Collection Clerk, and the Accounts Receivable Clerk.

Section 9(b) of the Act provides that “the Board shall decide in each case whether to assure to employees fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof.” It is well established under Board law that the Act does not require the unit for bargaining be the optimum, or most appropriate unit, but only an appropriate unit. *Home Depot USA*, 331 NLRB 1289, 1290 (2000); *Overnight Transportation Co.*, 322 NLRB 723 (1996). An appropriate unit ensures employees “the fullest freedom in exercising the rights guaranteed by the Act.” *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F. 2d 576 (7th Cir. 1951); *Dinah’s Hotel and Apartments*, 295 NLRB 1100 (1989). A union is not required to seek representation in the most comprehensive grouping of employees unless “an appropriate unit compatible with the requested does not exist.” *P. Ballantine & Sons*, 141 NLRB 1103 (1962). Furthermore, in *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971), the Board explained that when no other labor organization is seeking a unit larger or smaller than the unit requested by the petitioner, the sole issue to be determined is whether the unit requested by the petitioner is an appropriate unit.

In this case, the unit sought by the Petitioner, all full-time and regular part-time traffic control employees, yard employees, warehouse employees, strippers, sign shop employees, permanent installation employees, and mechanics is quite clearly an appropriate unit. The Employer does not dispute this. The record reflects that these employees share a distinct community of interest where they work together to manufacture, maintain, and install products, or provide on-site services associated with traffic control..

The Customer Care Representatives, the Collection Clerk, and the Accounts Receivable Clerk are clearly clerical employees. They work in the Employer’s office area. I find that they are office clericals. While the record reveals that these office clericals are engaged in daily work tasks which necessarily bring them into contact with the petitioned-for unit and that they perform clerical tasks related to traffic control work, I find that they do not have the same employment interests as the employees in the petitioned-for unit in view of their separate supervision, different method of compensation, different working conditions, lack of transfer to traffic control, striping, sign shop, mechanic, or yard positions. Moreover, it is the normal practice of the Board not to include office clericals in other units. Accordingly, I find an insufficiently close community of interest existing between these office clericals and the employees in the petitioned-for unit to require their inclusion in the unit, and I shall exclude them. *L. M. Berry & Co.*, 198 NLRB 217, 219 (1972).

The Planners also perform most of their work in the Employer’s office, and the Employer refers to them as clerical employees. They, like the employees found above to be office clerical employees, are supervised by the Office Manager. While Planners draw up plans that are used by field employees and would have some contact with field employees in the implementation of these plans, overall it appears that their employment interests are not the same as employees in the petitioned-for unit. They are separately supervised; they do not share in the broad range of

compensation enjoyed by the field employees; they do not perform manual labor, but rather work with computers; they work mostly indoors, while most of the employees in the petitioned-for unit work outdoors; there is no evidence that they once held any of the positions in the petitioned-for unit; and the record states that Planners do not transfer into positions in the petitioned-for unit, nor do unit employees become Planners. I also note that no other labor organization is seeking to represent a larger unit including the petitioned-for unit and the Planners.

Certain recent Board cases, although dealing with drivers and mechanics, are nevertheless analogous to the instant matter and support this result. For example, in *Overnite Transportation Company*, 322 NLRB 347 (1996), affirmed 322 NLRB 723 (1996) (denial of the employer's motion for reconsideration), the Board reversed the Regional Director's determination that mechanics shared such a close community of interest with drivers as to require their inclusion in the petitioned-for unit. While the evidence indicated that mechanics shared a sufficient community of interest to be included in the unit had the petitioner sought them, the Board found that the failure to include the mechanics did not render the drivers-only unit inappropriate where there existed separate supervision, mechanics possessed special skills, and there was no regular interchange. See also *Overnite Transportation Company*, 325 NLRB 612 (1998); *Laidlaw Waste Systems*, 299 NLRB No. 124 (1990).

Accordingly, for the reasons set forth above, I shall exclude the Planners from the unit found appropriate herein.

Therefore, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time traffic control employees, yard employees, warehouse employees, strippers, sign shop employees, permanent installation employees, and mechanics but excluding all other employees, office-clerical employees, guards, and supervisors as defined in the Act.

There are approximately 33 employees in the unit found appropriate herein.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election, which will issue soon, subject to the Board's Rules and Regulations. The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Also eligible are those in military

services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and, if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

**LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL UNION 872**

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned, two (2) copies of an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the National Labor Relations Board Resident Office, 600 Las Vegas Boulevard, South, Suite 400, Las Vegas, Nevada, 89101-6637, on or before April 21, 2008. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

The Board in Washington must receive this request by April 28, 2008. The request may be filed electronically through E-Gov on the Board's website, www.nlr.gov,² but may **not** be filed by facsimile

Dated at Phoenix, Arizona, this 14th day of April 2008

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director
National Labor Relations Board, Region 28

² Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**. To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, www.nlr.gov.